

**** NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER ****

NO. 25590

IN THE SUPREME COURT OF THE STATE OF HAWAII

MELVIN M. BENDER, Trustee under that certain unrecorded Revocable Trust of Melvin M. Bender, dated July 16, 1986, and MILDRED C.S. BENDER, Trustee under that certain unrecorded Revocable Trust of Mildred C.S. Bender, dated July 16, 1986,
Plaintiffs-Appellees

vs.

SUNNY LEE, Successor Trustee to Walter Lee, Trustee of the Lee Living Trust under that certain unrecorded Trust Instrument dated June 29, 1983, Defendant-Appellant

and

FREDERICK ALAN ZANE, Trustee of the Frederick Alan Zane Self Trused Trust dated December 17, 1993, as amended; HARRIS TIEN ZANE; NOLAN KOON WAH ZANE; NANCY PUI YING LAU YOUNG, Trustee under that certain unrecorded Revocable Trust Agreement; WALTER CHONG LIM LEE, Trustee of the Lee Living Trust under that certain unrecorded Trust Instrument dated June 29, 1983; JOHN DOES 1-10; JANE DOES 1-10; and DOE PARTNERSHIPS, CORPORATIONS or ENTITIES 1-20, Defendants

APPEAL FROM THE FIRST CIRCUIT COURT
(CIV. NO. 01-1-2848)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, and Nakayama, JJ
Intermediate Court of Appeals Associate Judge F. S. Key,
in place of Acoba, J., unavailable
and Circuit Judge Cardoza, assigned by reason of vacancy)

Defendant-Appellant Sunny Lee ("Sunny") appeals from (1) the Judgment of the Circuit Court of the First Circuit ("circuit court"), the Honorable Richard Pollack presiding, filed on December 18, 2002, and (2) the denial of her February 7, 2003 motion to stay the circuit court's injunction (contained within the December 18, 2002 order and judgment) ordering the

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CLERK, APPELLATE COURTS
STATE OF HAWAII

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disconnection of Sunny's sewer line from the sewer line running through Plaintiffs-Appellees Melvin Bender and Mildred Bender's (hereafter "the Benders") property. On summary judgment, the circuit court found that: (1) the sewer line running from Sunny's home connected with a sewer line running through the Benders' property; (2) Sunny had no "easement, permission, nor any other legal right to have the sewer line . . . enter into the [Benders'] property"; (3) Sunny's sewer line was thus illegally trespassing upon the Benders' property; (4) the Benders were entitled to \$651 in damages caused by the breakage of Sunny's trespassing sewer line; and (5) on account of the continuing trespass and the lack of any adequate remedy at law, Sunny's sewer line must be disconnected from the sewer line running through the Benders' property.

On appeal, Sunny argues that:

(1) the court erred in granting summary judgment, due to (a) the alleged existence of genuine issues of material fact, as exemplified by various exhibits filed with the court, (b) the alleged existence of an "easement" allowing Sunny's sewer line to connect to the line running through Bender's property, (c) a lack of evidence supporting the Benders' claim of property damage and the failure to consider Sunny's contrary proffered evidence, and (d) the "unjustified punishments[]" inflicted by the circuit court in depriving Sunny of "an essential City and County of Honolulu public service[;]" and

(2) the circuit court abused its discretion in

denying Sunny's motion to stay execution of the Benders' injunction, which allowed the Benders to disconnect Sunny's sewer line at her sole expense if she did not abide by the circuit court's order.

Upon carefully reviewing the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised, we hold as follows:

(1) The circuit court properly granted summary judgment in favor of the Benders. On summary judgment, the Benders had shown through their attached exhibits and declaration that (a) it was uncontested that Sunny's sewer line encroached on their property, (b) the Benders' property was free and clear of all encumbrances, and (c) Sunny had never been given any permission or right to connect her sewer line to the sewer line running through the Benders' property. The burden of production therefore shifted to Sunny, who was required to respond with specific facts showing that a genuine issue of material fact for trial still remained. Hawai'i Rules of Civil Procedure ("HRCP") Rule 56(e) (2000); see also Lee v. Puamana Community Ass'n, 109 Hawai'i 561, 567, 128 P.3d 874, 880 (2006) (quoting French v. Hawai'i Pizza Hut, Inc., 105 Hawai'i 462, 99 P.3d 1046 (2004)).

Assuming arguendo that (1) Sunny's memorandum in opposition to the Benders' motion for summary judgment was valid despite having been submitted by her daughter Monica (a person unauthorized to practice law in this jurisdiction) acting as "attorney-in-fact," in violation of, inter alia, Hawai'i Rules of Civil Procedure Rule 11(a) (2000), such that the opposition was

tantamount to being unsigned,¹ (2) the exhibits and declaration attached to Sunny's opposition to summary judgment could be considered as admissible evidence, and (3) the declaration of Sunny Lee filed in open court on October 31, 2002 may be considered, after painstaking review of the record, we hold that even when viewing the evidence in a light most favorable to Sunny, we cannot find a single genuine issue of material fact such that the matter must proceed to trial.

We further hold that Sunny's easement by necessity, prescriptive easement, and implied easement defenses are waived. None of these affirmative defenses to trespass were raised in Sunny's answer, as required by the Hawai'i Rules of Civil Procedure. See HRCPC Rules 8(c) (2000) and 12(b) (2000). In any event, the defenses are waived because: (1) the easement by necessity defense was not raised until Sunny's memorandum in opposition to the Benders' motion for summary judgment, such that the Benders were unfairly deprived of an opportunity to address the defense in their original memorandum in support of their motion for summary judgment; (2) similarly, the prescriptive easement defense was not raised until after the circuit court had orally granted summary judgment in the Benders' favor; and (3)

¹ HRCPC Rule 11(a) (signature requirements) provides in pertinent part:

Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party An unsigned paper shall be stricken by the clerk unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(Emphases added.)

the implied easement defense was improperly raised for the first time on appeal, see Alford v. City and County of Honolulu, 109 Hawai'i 14, 30, 122 P.3d 809, 825 (2005).

(2) The circuit court did not abuse its discretion in denying Sunny's HRCP Rule 62(c) (1980)² motion to stay the Benders' injunction. We first note that Sunny failed to obtain a supersedeas bond, which is required for a stay to issue. See HRCP Rule 62(d) (1980). Second, in light of our holding that the circuit court properly granted summary judgment in favor of the Benders, we hold that the circuit court properly found that the presence of Sunny's (functioning) sewer line on their property constituted a continuing trespass. Third, the Benders have represented, and Sunny does not dispute, that a free license had been offered for Sunny to maintain her sewer line connection to the sewer line running through the Benders' property, so long as she was willing to share in the costs of any repairs. Thus, Sunny's motion to stay injunction was properly denied.

² HRCP Rule 62(c) provides:

When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

Therefore,

IT IS HEREBY ORDERED that the judgment of the circuit court is affirmed.

DATED: Honolulu, Hawai'i, September 21, 2006.

On the briefs:

Sunny Lee,
Defendant-Appellant pro se

Paul A. Schraff, and
Valerie M. Kato, (of
Dwyer Schraff Meyer
Jossem & Bushnell)
for Plaintiffs-Appellees
Melvin M. Bender and
Mildred C. S. Bender

